IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 251

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, and JER PARTNERSHIP,

Plaintiffs,

v.

WILLIAMS NATURAL GAS COMPANY,

Defendant.

Filed
United States
District Court
Denver, Colo.
Jan. 16, 1995
James R. Manspeaker,
Clerk

ORDER AND MEMORANDUM OF DECISION

This is a contract dispute. Plaintiffs seek a declaratory judgment establishing defendant's obligation to continue to purchase natural gas following the conclusion of the primary term of the parties' gas purchase contracts. Defendant contends that it has an option to continue purchasing natural gas, rather than an obligation. The facts underlying this litigation are set forth in my prior Order and Memorandum of Decision filed October 28, 1993, which involved the consolidation of civil action numbers 92 N 612 and 92 N 2137.[1] Familiarity with that

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[1] Related disputes involving the same gas purchase contracts were resolved in Northwest Central Pipeline Corporation v. Mesa Petroleum Company, 643 F. Supp. 280 (D. Colo. 1986), and Northwest Central Pipeline

Order is assumed, and the facts will not be repeated here. The matter is now before the court on "Plaintiffs' Motion for Summary Judgment" filed October 11, 1994. Jurisdiction is based on 28 U.S.C.A. § 1332 (West 1993).

FACTS

In 1982, Defendant Williams Natural Gas Company ("Williams") entered into substantially identical gas purchase contracts with Plaintiffs Talus Properties Limited Partnership, Prima Oil and Gas Company, John P. Lockridge, Yuma County Oil Company, and JER Partnership [hereinafter collectively referred to as the "sellers"]. (See App. to Br. in Supp. of Pls.' Mot. for Summ. J., Apps. 1-3 [relevant excerpted provisions] [filed Oct. 11, 1994] [hereinafter "Pls.' App."]; see also Def.'s Br. in Opp'n to Pls.' Mot. for Summ. J., Ex. G [Lockridge contract] [filed Oct. 31, 1994] [hereinafter "Def.'s Br."].) The contractual provisions in dispute are sections 20 and 21 of the "Yuma contract," and sections 21 and 22 of the "JER and Lockridge contracts." (Pls.' App., Apps. 1-3.) Those provisions concern the term of the contracts and the defendant's right of first refusal.

Section 20 of the Yuma contract and section 21 of the Lockridge contract pertain to the term of the contracts and provide as follows:

> This Contract shall remain in full force and effect from the date hereof and shall extend for a period of twenty (20) years from the date of initial delivery of gas hereunder.

Corporation v. JER Partnership, 943 F.2d 1219 (10th Cir. 1991).

(Pls.' App., Apps. 1-2 ¶ 21 [JER and Lockridge contract excerpts], App. 3 ¶ 20 [Yuma contract excerpt].) Section 21 of the Yuma contract and section 22 of the JER and Lockridge contracts, which are the focus of this dispute, are titled "Preferential Right to Purchase and Right of First Refusal" and state in part:

> *Upon the expiration of the primary term of this Contract,* Seller hereby grants to Buyer the preferential right and the right of first refusal to purchase gas .... At least thirty (30) days, but not more than ninety (90) days, before the expiration of this Contract, Seller may make a bona fide offer to Buyer to sell that natural gas which may thereafter be produced .... *If no offer is made by Seller to Buyer within the time above described, then that natural gas thereafter produced . . . will continue to be sold to buyer under the terms and conditions of this Contract.* Thereafter, Seller shall have the right to make a bona fide offer at least thirty days, but not more than ninety (90) days, before the next anniversary date of this Contract and each and every anniversary date thereafter until Seller shall make a bona fide offer to Buyer within the above described time period prior to any succeeding anniversary date.
>
> If Buyer rejects Seller's offer and subsequently a third party accepts an offer by Seller to sell the gas subject to this Contract, then Seller, before selling such gas to a third party, must promptly present the offer accepted

> by the third party to Buyer .... Buyer shall thereupon have an option for a period of ten (10) days after the receipt of said notice to purchase this gas by accepting such offer. Should said ten (10) days extend beyond the termination date of this contract, Seller shall continue to sell gas to Buyer under the terms and conditions of this contract, until the ten (10) days granted to Buyer to exercise his option shall have expired. If Buyer refuses to accept this offer, then Seller is free to sell the natural gas to the third party that had accepted Seller's offer.

(Pls.' App., Apps. 1-2 ¶ 22 [JER and Lockridge contract excerpts], App. 3 ¶ 21 [Yuma contract excerpt] [emphasis added].)

Williams agrees that the preferential right to purchase provision would allow the contracts to continue beyond the primary twenty-year term; however, it argues that the only event that could trigger such continuation is its decision to exercise its right of first refusal. (Br. in Supp. of Pls.' Mot. for Summ. J., Statement of Undisputed Material Facts ¶ 7 [filed Oct. 11, 1994] [hereinafter "Pls.' Br."]; see Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶ 7.) Williams argues that the provision is ambiguous, and that the sellers' representatives previously expressed an intention contrary to that which is asserted in this dispute. (Pls.' Br., Statement of Undisputed Material Facts ¶¶ 4-5; see Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶¶ 4-5.) In contrast, the sellers maintain that they are obligated to continue to sell and Williams is obligated to continue to purchase gas after the

primary term in the event that the sellers fail to make a bona fide offer to defendant or a third party after expiration of the primary term. (Pls.' Br. at 6.)

Prior to executing the gas purchase contracts, Williams submitted drafts of the relevant provisions to the sellers, and the language of those sections remained unchanged in the parties' final executed contracts. (Pls.' Br., Statement of Undisputed Material Facts ¶¶ 1-2; admitted at Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶¶ 1-2.) Defendant concedes that the parties had no conversations or negotiations concerning the language of the applicable sections. (Pls.' Br., Statement of Undisputed Material Facts ¶ 3; admitted at Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶ 3.)

ANALYSIS

1. Legal Standard

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where there is "no genuine issue as to any material fact and the ... moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 321, 106 S. Ct. 2548, 2552 (1986); Thrifty Rent-A-Car Sys., Inc. v. Brown Flight Rental One Corp., 24 F.3d 1190, 1194 (10th Cir. 1994). Pleadings and documentary evidence must be construed in favor of the party opposing the motion. Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 796 (10th Cir. 1993).

When parties move for summary judgment on an issue on which they would not bear the burden of persuasion at trial, their burden of production may be satisfied by demonstrating an absence of evidence in the record to support the nonmoving party's case. Celotex Corp., 477 U.S. at 321, 106 S. Ct. at 2552. Once the moving parties have met their initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. Id.; see Thrifty Rent-A-Car Sys., Inc., 24 F.3d at 1194. A triable issue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429 (10th Cir. 1990). If the nonmoving party cannot muster sufficient evidence to establish a triable issue of fact, a trial would be useless and the moving parties are entitled to summary judgment as a matter of law. Anderson, 477 U.S. at 250, 106 S. Ct. at 2511.

2. Interpretation of the Gas Purchase Contracts

The sole issue presented in this dispute involves the interpretation of the gas purchase contracts. The interpretation of a written contract and the determination of whether a contract term is ambiguous are questions of law. Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1514 (D. Colo. 1992), aff'd, 13 F.3d 366 (10th Cir. 1993); Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 374 (Colo. 1990). Absent a statement of contrary intent or the presence of an ambiguity, the court must enforce the terms of a contract according to their plain and ordinary meaning. See Omnibank Parker Road, N.A. v. Employers Ins. of Wausau, 961 F.2d 1521, 1523 (10th Cir. 1992); Heller v. Fire Ins. Exch., 800 P.2d 1006, 1009 (Colo. 1990); In re May, 756 P.2d 362, 369 (Colo.

1988). To ascertain the meaning of a contract, an examination of the entire instrument is appropriate. See, e.g., Stegall v. Little Johnson Assocs., Ltd., 996 F.2d 1043 (10th Cir. 993).

Plaintiffs' position is that "based upon the clear and unambiguous language of the contracts, [after] the primary 20-year term of the contracts, Plaintiffs are obligated to continue to sell and [Williams] is obligated to continue to purchase gas under the terms and conditions of the contracts if no bona fide offer to sell natural gas that is thereafter produced from the wells, leases and lands described on Exhibit A to the contracts is made by Plaintiffs to defendant within the specified time period." (Pls.' Br. at 6-7.) The sellers argue that the commercial circumstances surrounding the execution of the gas purchase contracts bolster their position based on the fact that "at the time the Contract[s were] signed, "Williams 'was aggressively pursuing' natural gas supplies to satisfy their customers['] needs, and they were competing for those contracts in an environment where prices appeared to be rising and where most people in the industry expected the prices to continue to rise.'" (Pls.' Reply Br. at 10 [filed Nov. 14, 1994].)

Defendant challenges plaintiffs' position based upon the sellers' purported contradictory statements of intent. First, defendant argues that plaintiffs' attorney sent a letter to Williams' attorney outlining certain claims plaintiffs were asserting in a prior litigation involving the same gas purchase contracts. (Def.'s Br., Resp. to Statement of Undisputed Material Facts ¶ 4, Ex. B.) That letter contained statements and damage schedules that, according to defendant, reflected plaintiffs' understanding that the contracts expired in 2002, or twenty years after they commenced. Further, defendant argues that Plaintiff Talus Properties Limited Partnership

commissioned a reserve study for the wells that assumed the contracts would last for a period of twenty years. (Id., Ex. F.) Moreover, defendant offers a series of documents, including prior court decisions, as parol evidence that the contracts expire at the end of their twenty-year term. (Def.'s Br. at 8.) In those prior matters, however, the meaning of sections 21 and 22 of the contracts (the "preferential right to purchase") were not at issue.

Parol evidence is not admissible for purposes of creating an ambiguity. See Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1194 (9th Cir. 1986). Contractual terms are not rendered ambiguous merely because the parties subsequently urge diverse interpretations. See Stichting Mayflower Recreational Fonds v. Newpark Resources, Inc., 903 F.2d 741, 749 (10th Cir. 1990). Rather, a contract is ambiguous where the text of an agreement reasonably allows for varying interpretations, and a court will not "torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity ...." See Wards Co., Inc. v. Stamford Ridgeway Assocs., 761 F.2d 117, 120 (2d Cir. 1985).

In this case, the parties' mere disagreement with respect to the controlling contract language does not establish the existence of an ambiguity. See Kuta v. Joint Dist. No. 50(J), 799 P.2d 379, 382 (Colo. 1990). The primary term of the gas purchase contracts is clearly established as twenty years. (See Pls.' App., Apps. 1-3.) Upon expiration of that term, the rights of the parties are unambiguously set forth in paragraphs 21 and 22 of the contracts. (Id.) During the "secondary term" of the contracts, plaintiffs obtain the right to make an offer to defendant. Plaintiffs may also make an offer to sell gas to a third party, in which case defendant receives a right of first

refusal on that offer. If the sellers make no such offer to defendant during the time periods allotted in the contracts, then the contract establishes that "the natural gas thereafter produced...will continue to be sold to buyer under the terms and conditions of this Contract." (Id.) Contrary to defendant's contention, I find that, as a matter of law, the provision at issue is not susceptible to any other meaning.

Twenty years is simply the primary term of the lease. Upon expiration of the primary term, the lease does not terminate. Rather, the parties' rights and obligations are altered by the terms and conditions set forth in the contracts' "preferential right to purchase" provision. Under no circumstance does that provision grant defendant a blanket "option" to continue with the contracts. Had defendant wanted an option, it presumably would have known how to draft that language. In fact, the contract explicitly provides defendant an option in the second paragraph of the preferential right to purchase provision, which gives Williams the option to accept or reject an offer that has been accepted by a third party. That option does not mean that, in the absence of a third party's acceptance, the contract terminates. On the contrary, the contract continues unless an offer is made to a third party, which defendant rejects when given the opportunity to accept the same. Moreover, the provision discusses the sellers' continuing right to make a bona fide offer to defendant during a specific thirty-to ninety-day period each year. This continuing right only exists upon expiration of the primary term of the contract. If the contract terminated at the end of the twenty-year primary term, it would render the sellers' annual right to make such a bona fide offer meaningless. Further, defendant's reliance on the title of the relevant provision, i.e., "preferential right to purchase," also fails to create the existence of an

ambiguity, particularly in light of paragraphs 19(d) and 20(d) of the contracts which provide that "the headings of various sections of this Contract are for convenience only and are not to be considered as interpreting any provision of this Contract." (Def.'s Br., Ex. G at 20.) Accordingly, defendant is obligated under the unambiguous language of the contracts to continue to purchase gas past the primary term of the contract in accordance with the terms and conditions of the contracts. Based on that conclusion, I need not reach the parties' arguments concerning reformation of the contracts.

3. Conclusion

Based on the foregoing, it is therefore

ORDERED that plaintiffs' motion for summary judgment is GRANTED. All other motions are DENIED as moot.

The clerk shall enter judgment declaring that, under paragraphs 21 and 22 of the respective contracts, plaintiffs are obliged to sell and defendant is obliged to purchase (consistent with all other terms and conditions of the contracts) the natural gas produced from wells and acreage committed to the contracts, at the conclusion of the primary terms of the contracts, if no offer is made by plaintiffs to defendant.

Dated this 16 day of January, 1995.

BY THE COURT:

"s/ _____"
EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 251

CERTIFICATE OF MAILING

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on January 16, 1995, was mailed to the following on January 17, 1995:

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Magistrate Judge Bruce D. Pringle

JAMES R. MANSPEAKER,
CLERK

By "s/_____"
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 251

TALUS PROPERTIES LIMITED PARTNERSHIP, PRIMA OIL AND GAS COMPANY, JOHN P. LOCKRIDGE, YUMA COUNTY OIL COMPANY, AND JER PARTNERSHIP,

Plaintiffs,

v.

WILLIAMS NATURAL GAS COMPANY,

Defendant.

Filed
United States
District Court
Denver, Colo.
Jan. 21, 1995
James R. Manspeaker,
Clerk

JUDGMENT

PURSUANT to and in accordance with the Order And Memorandum Of Decision entered by the Honorable Edward W. Nottingham on January 16, 1995, it is

ORDERED that plaintiffs' motion for summary judgment is granted. Under paragraphs 21 and 22 of the respective contracts, plaintiffs are obliged to sell and defendant is obliged to purchase (consistent with all other terms and conditions of the contracts) the natural gas produced from wells and acreage committed to the contracts, at the conclusion of the

primary terms of the contracts, if no offer is made by plaintiffs to defendant. It is

FURTHER ORDERED that each party shall bear its own costs.

DATED at Denver, Colorado, this 21 day of January, 1995.

BY THE COURT:

"s/ "
Edward W. Nottingham, Judge
United States District Court

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK

"s/ "
By:
Stephen P. Ehrlich,
Chief Deputy Clerk

94 N 251
Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94 N 251

CERTIFICATE OF MAILING

I hereby certify that a copy of the Judgment entered on January 21, 1995, was mailed to the following on January 23, 1995:

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JAMES R. MANSPEAKER,
CLERK

By "s/ "
Deputy Clerk